Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

No. 95 - 974

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FLA-187 COMMITTEE, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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January 22, 1996

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T. Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall (1989)..... 5

J. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503 (1990)..... 6, 9

W. Rehnquist, Point, Counterpoint: The Evolution of American Political Philosophy, 34 Vand. L. Rev. 249 (1981)..... 9

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INTEREST OF THE AMICI CURIAE

The **FLA-187 Committee, Inc.**, located in Boca Raton, Florida, and founded in April, 1995, is a non-profit corporation engaged in grassroots political activity in the State of Florida. The Committee registered as a "political committee," and in May, 1995, filed four proposed amendments to Florida's Constitution with the Secretary of State. One of the amendments bears the title "Governmental Implementation and Utilization of Official English," and by its express terms will amend Article II, Section 9 of the state constitution. Distribution of the amendment petitions began in mid-1995, and literally hundreds of grassroots volunteers have collected thousands of signatures from Florida's registered voters as of this date. The FLA-187 Committee believes that the Ninth Circuit Court of Appeals' ruling in the instant matter, if not reviewed by this tribunal, will have a chilling effect on political activists throughout the nation who are utilizing the initiative and referendum process to implement or strengthen their state's "Official English" laws. *All parties have consented to the filing of this Brief.*

Citizens of Dade United ("CODU"), a non-profit corporation based in Miami, Florida, is also engaged in grassroots political activity in the State of Florida. Incorporated in 1980, CODU was instrumental in distributing and collecting a sizable number of the more than 300,000 petition signatures needed to place the original "Official English Amendment" on Florida's General Election Ballot in 1988; members also devoted thousands of hours to the passage of the amendment, now codified as Article II, Section 9, of the Florida Constitution. CODU's membership provided guidance in the 1995 drafting of the proposed FLA-187 amendment relating to "Official English," and has assisted in the collection of petitions relating to said amendment.

The **California Coalition for Immigration Reform** ("CCIR"), headquartered in Huntington Beach, California, is an incorporated grassroots political organization which serves as an umbrella organization for some 24 grassroots groups in 5 states which are concerned with the influx of legal and illegal immigrants into the western United States, and with the assimilation of new arrivals into the American mainstream. CCIR was a sponsoring organization of California's Proposition 187 in 1994, and is currently in the process of drafting a citizen's initiative similar in scope and effect to Arizona Constitution Article XXVIII, the subject of the instant case. CCIR is cognizant of California's presence within the Ninth Circuit's jurisdiction, and seeks review of this decision in view of its direct impact on all grassroots activists living in states on the West Coast.

The **Freedom Forum** ("Forum") is an unincorporated association based in Montgomery, Alabama, serving as an umbrella organization for grassroots political groups within Alabama. The Forum has conducted research into the growing non-English speaking population within the state, and has commenced with the drafting of legislation for consideration by state legislators. The Forum is concerned that the Ninth Circuit's decision in *Yniguez* will have a substantially negative impact on proposed legislative or constitutional revisions relating to Official English.

SUMMARY OF ARGUMENT

The *amici curiae* supporting the petition for the granting of a writ are all grassroots political organizations with a deep concern for the nationwide impact of the ruling by the Ninth Circuit Court of Appeals in *Yniguez*.

The *amici* have set forth the historical context for the utilization of the initiative process in the United States. The dynamic level of growth in its use, and even the support for a national initiative, underscore the initiative process' critical place on the modern political landscape. The 1988 Arizonans for Official English campaign is highly illustrative of the enormous effort expended by countless volunteers in placing the measure on the ballot and guiding its passage; all this, on a political issue of deep concern to virtually all Americans - assimilation of immigrants and the preservation of a common language.

The district court and court of appeals issued rulings in *Yniguez* setting forth new modes of First Amendment doctrinal analysis, based upon ethereal constitutional underpinnings. Both tribunals failed to distinguish recent Supreme Court rulings concerning a state's ability to control employees when they speak for that state.

Grassroots political activists around the nation are seeking protection for their efforts from federal judges who desire to substitute the court's judgment for those of "the people" in the political arena, perhaps by this Court's delineation of a precise standard of review for analyzing citizen-sponsored initiatives. All branches of government should be ever-mindful that they derive "their just powers from the consent of the governed."

ADDITIONAL REASONS FOR GRANTING THE WRIT

I. THE POWERS RESERVED TO THE PEOPLE SHOULD NOT BE ABROGATED BY THE UNWARRANTED EXPANSION OF CONSTITUTIONAL DOCTRINE

The matter *sub judice* touches directly upon Article XXVIII of the Arizona Constitution, but casts an indirect shadow over the efforts of hundreds of thousands of grassroots political activists, past and present, who have participated in majoritarian democracy at its most basic level. The majority opinion of the *Yniguez* tribunal, particularly its creation of several new First Amendment litmus tests which interfere with state governmental operations, will have far-reaching effects at every level of the political process, and a review of *Yniguez* by this court is fully deserved by the citizens of this nation.

A. Historical Context: Participation by the People Through Initiatives

The "people" and the "states" are the repository of all powers not specifically delegated to the United States. U.S. Constitution, amend. X ; 2 J. Story, *Commentaries on the Constitution of the United States*, 652 (5th ed. 1891). The "right of the people" to communicate with the government directly and to engage in direct democratic action is constitutionally safeguarded by the First Amendment's prohibition against the enactment of any law abridging the

right "to petition the [g]overnment for a redress of grievances." U.S. Constitution, amend. I.

From the same analytical wellspring from which the right to petition arose came the direct participation of the citizenry in constitutional conventions and in the ratification process during this nation's founding period. T. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 12-20 (1989). Beginning in the latter 19th century, some two dozen states have adopted the Swiss-style constitutional initiative mechanism, and variations are highly popular throughout the U.S. today. Collins and Oesterle, *Structuring the Ballot Initiative*, 66 U. Colo. L. Rev. 47, 54 (1995).

Through the enactment of measures providing for a system of initiative and/or referendum, the electorate obtains the means to directly propose laws or amendments to a state's constitution. See Ariz. Const. art. XXI; Fla. Const. art. 11, sec. 3. It was intended that the initiative process would empower "the people," indeed, that the initiative would serve as "a way around monied influence on elected representatives ... would thrust from power the Captains of Greed." Collins, *supra*, at 56. In view of the chronic lack of financing suffered by the grassroots organizations which typically advance initiative campaigns, the enormous petition-drives necessary to gather signatures for ballot access, and the typical presence of unpaid grassroots volunteers rather than paid political operatives in most campaign positions, it is not unrealistic to characterize these campaigns as the quintessence of participatory democracy.

B. Current Grassroots Citizen-Based Political Participation

A dynamic grassroots volunteer-based effort is essential in most modern initiative campaigns; this characterization would fit not only petitioner Arizonans for Official English's 1988 Campaign for Proposition 106 (now codified as Article XXVIII), but the 1994 California Proposition 187 campaign by *amicus* C.C.I.R. and the current *amicus* FLA-187 Committee's Official English campaign, in addition to numerous other grassroots citizen-based initiative drives over the past decade.

The thirst for an increase in direct democratic participation has grown throughout this century; in 1988 California voters received explanatory pamphlets on proposed state, county and local amendments, initiatives and laws. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1508-09 (1990). Further, two-thirds of persons questioned in a 1983 Gallup survey indicated support for direct citizen-review of state and local laws, while polls conducted in 1978, 1981, and 1987 all supported a constitutional amendment for a national initiative by a more than two-to-one margin. *Id.* at 1507 n. 16.

C. Citizen-Based Political Decision-Making and the Yniguez Rulings

In the 1988 Arizona Proposition 106 campaign, the Arizonans for Official English, its supporters and grassroots volunteers were required to obtain by initiative petition the signatures of "a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for Governor at the last preceding general election." Ariz. Const. art. XXI, sec. 1. This requirement

amounted to thousands of voter signatures, the collection of which took an enormous effort by hundreds of volunteers and paid signature gatherers over many months, followed by an arduous election campaign. The issue was debated throughout the state, on a topic of national political significance: the creation of incentives for immigrants to assimilate rapidly, and prevent the estrangement of linguistic groups, so familiar to those who have studied Belgium, Africa, Canada, China, the Balkans and other bilingual or multilingual areas.

Despite the political will of the people of Arizona, as expressed in the November, 1988 election, a state employee immediately filed suit in federal court alleging deprivation of constitutionally-protected rights, including abridgement of her freedom of speech.

The trial court, in its 1990 ruling on the constitutional claim, did not even mention any regret that the electoral expression of "the people's will" was to be subordinated to the First Amendment claim advanced by plaintiff Yniguez; indeed, except for bare mention of the general election, the direct participation of Arizona's citizenry in this matter goes unmentioned. *See Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990).

In deciding that Article XXVIII was facially overbroad, Circuit Judge Reinhardt's majority opinion delineates several new constitutional doctrines, including the assertion that the regulation of choice of language by the state for public employees is tantamount to regulation of speech content. *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 934-36 (9th Cir. 1995). In framing additional new constitutional standards, the court opined that the individual decision of an employee or elected official regarding "best interests" will serve as the benchmark for the constitutional analysis of State-

mandated public language choices, *id.* at 937, and also that the fact that speech occurs as part of the performance of a public employee's job functions is not conclusive in terms of control, but instead the State's right to control that speech must undergo a balancing test, *id.* at 940.

The *Yniguez* majority failed to distinguish this Court's recent ruling that "the government as employer has far broader powers than does the government as sovereign ... [that in] many situations ... the government must be able to restrict its employees' speech ... [and] many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters v. Churchill* ___U.S.____ , 114 S.Ct. 1878, 1886 (1994). As noted in Judge Fernandez' *Yniguez* dissenting opinion, this Court has held that a state, when it is the speaker, "may make content-based choices." *Yniguez*, 69 F. 3d at 957 (Fernandez, J., dissenting) *quoting Rosenberger v. Rector and Visitors of Univ. of Va.*, ____U.S.____, 115 S. Ct. 2510, 2518-19 (1995). Further, the *Rosenberger* court opined "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 115 S. Ct. at 2519, *citing Rust v. Sullivan*, 500 U.S. 173, 194, 111 S. Ct. 1759, 1773 (1991).

Grassroots political organizations working on initiative campaigns believe that the *Yniguez* majority objected to Article XXVIII on the basis of political philosophy, and in effect substituted the majority's view on multilingualism for that of the voters of Arizona. This issue is decidedly political, and neither Ms. Yniquez nor recipients of public services have a constitutional basis for deciding the mode of delivery. The *Yniguez* majority's analysis has ignored "the difference

between a government employee who contributes to the marketplace of ideas and an employee who speaks in a mode which helps the members of public [in] understanding what he says." *Yniguez*, 69 F.3d at 960 (Wallace, C.J., dissenting), *citing United States v. National Treasury Employees Union*, ____U.S. _____, 115 S. Ct. 1003, 1015 (1995).

D. The Need to Grant the Petition for Writ of Certiorari

The Issuance of a Writ of Certiorari by the Court is important to grassroots political activists, and indeed, to the nation as a whole, to preserve the sense that all segments of the American political spectrum have a voice in the governance of this nation. As noted by Chief [then Associate] Justice Rehnquist, "[i]f we do not likewise contain the courts, in some way, from negating a law that, although unwise in the eyes of some, is nonetheless rendered unconstitutional only by a considerable stretch of judicial imagination, we risk a repetition of what one of my predecessors on the Supreme Court referred to as 'Judicial Supremacy'." W. Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34. Vand. L. Rev. 249, 263 (1981). As noted by Professor Eule, "[a] nation that trace power to the people's will does not easily digest the practice of unelected and unaccountable judges denying the populace what most of them appear to want." Eule, *supra*, at 1504.

This begs the question as to just what standard of review should be utilized by lower federal courts analyzing claims similar to that brought by the public employee in this case. The *amici* assert that when a state constitutional provision which has been enacted *directly by the people* is

challenged, and the provision deals directly with services provided by the state, a more deferential standard of review should be utilized. This would give effect to the Supreme Court's acknowledgment that state laws which provide for initiative and referendum "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. 137, 141 (1971). "Under our constitutional assumptions, all power derives from the people ... [and] the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672 (1976) (Burger, C.J.) (citations omitted).

This Court should provide guidance to lower federal courts, and should admonish them to exercise exceptional care during the review of a citizen-based initiative; those initiatives that bear a reasonable relationship to traditional state objectives, and which do not trample well-settled individual liberties, should be shielded from judicial whim.

It has been noted that, abstract theories of sovereignty and democracy aside, "[a] judicial decision striking down a voter effort also risks engendering a perception by the public itself that its will has been subverted." Eule, *supra*, 99 Yale L.J. at 1506. Just such a perception has arisen in Arizona because of the *Yniguez* decisions, in California because of the trial court's decision in *LULAC v. Wilson*, No. CV 94 - 7569 MRP (C.D. Cal. Nov. 20, 1995) [Proposition 187 decision], and elsewhere in the nation. We would do well to recall the Declaration of Independence's assertion that governments derive "their just powers from the consent of the governed."

CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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